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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - CENTRAL DIVISION
HONORABLE GEORGE H. WU, U.S. DISTRICT JUDGE

NEW YORK MARINE and GENERAL
INSURANCE COMPANY,

Plaintiff,

Case No. CV 22-4685

vs.

AMBER HEARD,

Defendant.

REPORTER'S TRANSCRIPT OF
MOTIONS TO DISMISS HEARING
Monday, March 13, 2023
8:30 a.m.
LOS ANGELES, CALIFORNIA

TERRI A. HOURIGAN, CSR NO. 3838, CCRR
FEDERAL OFFICIAL COURT REPORTER
350 WEST FIRST STREET, ROOM 4311
LOS ANGELES, CALIFORNIA 90012
(213) 894-2849

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:

MCCORMICK BARSTOW SHEPPARD WAYTE and CARRUTH LLP
BY: JAMES P. WAGONER
NICHOLAS H. RASMUSSEN
Attorneys at Law
7647 North Fresno Street
Fresno, California 93720

FOR THE DEFENDANT:

PASICH LLP
BY: KAYLA ROBINSON
OWEN MONKEMEIER
Attorneys at Law
10880 Wilshire Boulevard, Suite 2000
Los Angeles, California 90024

FOR MOVANT: TRAVELERS COMMERCIAL INSURANCE COMPANY

MAYNARD COOPER and GALE LLP
BY: NICHOLAS J. BOOS
Attorney at Law
2 Embarcadero Center, Suite 1450
San Francisco, California 94111

1 LOS ANGELES, CALIFORNIA; MONDAY, MARCH 13, 2023

2 8:30 a.m.

3 --oOo--

4 (COURT CALLED TO ORDER.)

5
6 THE COURT: All right. Let me call the matter of
7 *New York Marine versus General Insurance Company versus Heard.*

8 Let me have appearances starting with plaintiff's
9 counsel first.

10 MR. WAGONER: Good morning, Your Honor. James
11 Wagoner and Nick Rasmussen on behalf of New York Marine.

12 THE COURT: Okay. You guys must be from the east
13 coast?

14 Are you guys local?

15 MR. WAGONER: I didn't hear the Court.

16 THE COURT: Are you from the east coast or local?

17 MR. WAGONER: Local.

18 THE COURT: The problem is you always go the
19 opposite side of her. If you would go together sometimes, this
20 case would be resolved by now.

21 MR. WAGONER: I understood it, but I figured if she
22 is so used to that side --

23 THE COURT: Do you always blame her for everything
24 too?

25 All right. Switch over, that way I won't get you

1 confused.

2 For the defense, we have?

3 MS. ROBINSON: Your Honor, Kayla Robinson and Owen
4 Monkemeier for Amber Heard.

5 THE COURT: All right.

6 MR. BOOS: Your Honor, Nicholas Boos for Travelers
7 on the consolidated case.

8 THE COURT: All right. We are here for motions to
9 dismiss, and alternatively, for a more definite statement
10 and/or to strike certain allegations.

11 I issued a tentative on this, I presume both
12 sides have seen it?

13 MS. ROBINSON: Yes, Your Honor.

14 THE COURT: Does somebody want to argue something?

15 MR. WAGONER: Your Honor, James Wagoner on behalf of
16 New York Marine.

17 I essentially am in agreement with the tentative
18 ruling for more than the reasons stated, but the one thing I
19 wanted to comment about the motion to dismiss the counterclaim,
20 the Court's tentative refers to Paragraph 20 or 36(c).

21 THE COURT: Let me ask, what page are you referring
22 to?

23 MR. WAGONER: Page 12 of the counterclaim. Oh, you
24 mean the Court's ruling, it would be page 12 as well.

25 THE COURT: Looking at page 12, you are talking

1 about -- you are referring to the California Civil Code
2 section?

3 MR. WAGONER: I am referring to -- the top of
4 page 12, the Court's states: While New York Marine has not
5 effectively closed off the possibility that Heard could
6 potentially state an implied covenant counterclaim, without a
7 viable release of counterclaim, given its failure to
8 acknowledge the existence of or consider the effect of the
9 allegation of Paragraph 36, it's likely the Court will require
10 further amendment.

11 My only comment with 36(c) is failing to inquire
12 into the possible basis that might support coverage for the
13 death lawsuit. That looks to me like kind of a boilerplate
14 allegations out of a lot of complaints for bad faith, but in
15 this case, New York Marine did acknowledge coverage, and did in
16 fact say it would defend Heard.

17 So I don't see how Paragraph 36(c) could in any
18 way support a bad faith claim.

19 THE COURT: Well, let me have the defense respond.
20 I think I understand what the defense is about to say.

21 MS. ROBINSON: Well, Your Honor, our understanding
22 with respect to your tentative is that you found these were
23 boilerplate allegations and you were not inclined to let them
24 stand as a stand-alone claim but were inclined to allow us to
25 plead additional facts in support of our bad faith claim, and

1 we have no problem with that approach, and I don't think
2 Mr. Wagoner's argument is inconsistent with that.

3 THE COURT: She is saying there is a possibility, I
4 thought there was a possibility, and there might be a
5 possibility, we have to see.

6 MR. WAGONER: That is why I wanted to point out that
7 we don't agree that Paragraph 36 raises that.

8 THE COURT: The fact it isn't in the tentative, it
9 doesn't say one side or the other agrees with it. I am telling
10 you what my thoughts are.

11 MR. WAGONER: With permission, Mr. Rasmussen will
12 address the motion to strike. Do you want to put that over?

13 THE COURT: Sure. All right.

14 MS. ROBINSON: Thank you for your tentative, Your
15 Honor. I think we will continue to agree to disagree, but
16 given that the Court has considered these issues now twice, I
17 do want to respect that the Court --

18 THE COURT: Let's put it this way, it is an issue
19 that probably an Appellate Court should look at.

20 MS. ROBINSON: Yes, Your Honor.

21 The only point I wanted to raise that was not in
22 our briefing with respect to the motion to dismiss, is that the
23 Court comments that it's unclear whether the Ninth Circuit was
24 aware of the ethical duties in *Washington*, when it decided in
25 the *Northern Insurance* case.

1 In fact the briefing in that case expressly
2 addresses that the rule in *Washington* is that a point of
3 defense counsel may undertake representation of only the
4 insured, not of the company. That is the squarest reference to
5 this rule. It's in the answering brief on cross appeal, that
6 is 1991 Westlaw 11673437.

7 So that would be the only points with respect to
8 the Court's decision on the breach of contract claim.

9 I would like to add, Your Honor, that we are
10 still assessing -- the basis of the breach of contract claim
11 was breach of the duty to defend, as your tentative suggests,
12 that was our only theory with respect to breach of the duty to
13 defend.

14 However, we're now considering amending to
15 include breach of the duty to indemnify as well, so would only
16 ask that the Court, not foreclose amendment to pursue that
17 different theory as well, and I don't think that anything in
18 the Court's tentative --

19 THE COURT: Let me stop you. Let me ask plaintiff's
20 counsel, what is your response to that?

21 MR. WAGONER: I don't see how they can claim a
22 breach of the duty to indemnity, because according to the press
23 the judgment has been paid by different insurance companies.
24 So I don't see how there is any contractual damages there at
25 all.

1 MS. ROBINSON: We would be entitled to nominal
2 damages, and I think it would support a bad faith claim for
3 failure to investigate.

4 MR. WAGONER: I'm sorry?

5 THE COURT: You need to repeat what you just said.

6 MS. ROBINSON: We would be entitled to nominal
7 damages.

8 MR. WAGONER: I don't think you get nominal damages
9 for breach of contract.

10 MS. ROBINSON: Under California law, you are
11 entitled to nominal damages for breach of contract.

12 MR. RASMUSSEN: Your Honor, I would point out, if
13 she failed to fully accept the defense that was properly
14 provided, as we discussed in our briefing, it's Ms. Heard who
15 was in breach. At the time the breach occurred, there wasn't a
16 duty to indemnity.

17 THE COURT: Well, let me put it this way, I will see
18 what she has to say. We might as well not do this piecemeal, I
19 will give her an opportunity to amend.

20 I understand the position of the plaintiffs is
21 that she is going to have a hard row to hoe.

22 Is that the proper terminology?

23 MS. ROBINSON: Row to hoe.

24 THE COURT: I don't know, who knows.

25 So many other people use these types of phrases,

1 and it may just look like drool, what can I say? Be that it
2 may.

3 I will give leave to amend. We will see. Let me
4 ask, any further arguments?

5 MR. RASMUSSEN: Your Honor, I was going to address
6 the motion to strike. There is a couple of issues which we
7 have with this.

8 No. 1, is most simply, you know, these
9 allegations, she kind of contends relate to her expectations of
10 the policy, at least as to where it stands right now with the
11 duty to defend. If the defense provided was acceptable, which
12 appears this Court agrees it was, then there is no question
13 left of what the expectation was.

14 And to that, what I would point out if she got
15 what she was entitled to, she may sort of point to marketing
16 statements and complain, well, I didn't think it lived up to
17 what I got, but that is kind of like going to a movie theatre,
18 paying for a ticket, and not liking the movie.

19 THE COURT: Well, the problem I have is the motion
20 to strike, at least in this Circuit is so high, it has to be,
21 like, four letter words or accusations are so false, et cetera,
22 if it's not that, then the Circuit seems to say, well, who
23 really cares.

24 I understand litigants do, but the Circuit Judges
25 don't.

1 MR. RASMUSSEN: I understand that some of them take
2 that fairly high bar, and I guess I look at it, and say it has
3 to be germane to the claim.

4 And, in this case, particularly in the absence of
5 any plausible allegation that she looked at or denied these,
6 it's basically a bunch of stuff that is put in that looks, rah,
7 rah, but doesn't do anything other than inflame people.

8 And that, to me, under the materiality or
9 pertinence standard, does seem to come into it.

10 THE COURT: But the fact is, if it has any sort of
11 marginal relevance, I can't exclude it. And so, you know, you
12 are saying that -- I understand the plaintiff's position but I
13 mean the tentative will probably stand on that aspect of it.
14 Anything else?

15 MR. RASMUSSEN: Not from me, Your Honor.

16 THE COURT: Anything from the defense?

17 MS. ROBINSON: Just one point on the motion to
18 strike.

19 Your Honor, we have enough disputes in this case,
20 and I don't think have problem with striking the reference to
21 co-actions net worth.

22 However, I would point out that a defendant's net
23 worth is relevant to ability to pay punitive damages, so, just
24 would like to preserve that issue going forward.

25 THE COURT: All right, that's fine.

1 Anything else from either side?

2 All right. I will make my tentative my final as
3 of today's date.

4 Do we need to -- I guess somebody should prepare
5 a proposed order.

6 MR. WAGONER: We will prepare the proposed order.
7 Does the Court want us to recite what is in the tentative?

8 THE COURT: You can attach the tentative. Just say
9 for reasons stated in the tentative, and that should be
10 sufficient.

11 MR. WAGONER: All right.

12 THE COURT: Thank you very much. Everybody, have a
13 nice day.

14

15 (The proceedings concluded at 8:58 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

COUNTY OF LOS ANGELES)
)
STATE OF CALIFORNIA)

I, TERRI A. HOURIGAN, Federal Official Realtime Court Reporter, in and for the United States District Court for the Central District of California, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the judicial conference of the United States.

Date: 16th day of March, 2023.

/s/ TERRI A. HOURIGAN

TERRI A. HOURIGAN, CSR NO. 3838, RPR, CRR
Federal Court Reporter

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